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CIMB Bank Bhd v AmBank (M) Bhd & Ors

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-20–06 OF 2016(B)
RAUS SHARIF CHIEF JUSTICE, ZAINUN ALI, ABU SAMAH NORDIN, AZIAH ALI AND JEFFREY TAN FCJJ
16 AUGUST 2017

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Land Law — Indefeasibility of title and interests — Sale of land — Removal of appellant as chargee by forged documents — Claim of appellant and first respondent banks as chargees of same land — Whether chargee comes under meaning of purchaser under proviso to s 340(3) of the National Land Code — Whether first respondent acquired indefeasible title to property — Whether title of chargor obtained by void instrument — Whether first respondent subsequent bona fide purchaser or immediate purchaser — Whether respondent entitled to protection under proviso in s 340 of the National Land Code

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On 23 March 2006 one Ching Ting Seng and Ching Chong Lup ('the Chings'), the owners of a piece of land situated in Klang ('the land'), executed a charge on the land in favour of Southern Bank Bhd ('SBB') as security for a banking facility. The business of SBB was later vested unto CIMB Bank Bhd ('the appellant'). One Wong Chee Keong ('Wong') entered into an agreement to purchase the land from the Chings. On 14 November 2008, Wong applied for a loan from AmBank (M) Bhd ('the first respondent') to finance the purchase of the land. The land was used as a security for the loan. The solicitors acting for the first respondent bank conducted the relevant property searches, made the appropriate enquiries and obtained all the necessary undertakings and confirmations from the solicitors acting in the sale and purchase transaction between the Chings and Wong. The solicitors then proceeded to prepare the necessary documentation including the creation of the charge over the land in favour of the first respondent. On 25 November 2009, the land office effected the discharge of the appellant's charge and registered Wong as the registered proprietor of the land. Thereupon, the first respondent was registered as the chargee of the land. It was subsequently discovered that the removal of the appellant as chargee and the registration of the first respondent as chargee of the land were carried out by means of forged documents and that there were two titles over the land. The claims by the appellant and the first respondent as chargees over the same land became the core of the dispute in this case. Given its finding that the discharge of charge was a forgery, the trial court held that s 278 of the National Land Code ('the NLC') had not been complied with to effect a discharge of the said land, and that the first respondent being an immediate purchaser was not entitled to the protection under the proviso of s

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A 340(3) of the NLC. As such, the High Court decided in favour of the appellant. On appeal, the Court of Appeal held that the first respondent was a subsequent purchaser whose interest was protected by the proviso of s 340(3) of the NLC in accordance with the deferred indefeasibility principle. Thus, the Court of Appeal allowed the first respondent's appeal. The appellant has B obtained leave to proceed with the present appeal. This appeal turned on the issue as to whether a chargee came within the meaning of 'purchaser' under the proviso of s 340(3) of the NLC. In this appeal, the appellant submitted that Wong, the chargor, only acquired defeasible title to the land which was liable to be set aside within s 340(2)(b) of the NLC. The appellant then went on to C argue that since it had been established that Wong acquired no title to the land, he could not be found to have given any charge on such impugned title. Hence, the charge created by Wong in favour of the first respondent should be set aside.

Held, dismissing the appeal with costs:

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(1) **(per Raus Sharif Chief Justice, majority)** The sole issue determined by the High Court and the Court of Appeal was whether the first respondent was an immediate or a subsequent purchaser. However, both courts did not arrive at the same conclusion. The High Court found the first E respondent to be an immediate purchaser, while the Court of Appeal found the first respondent to be a subsequent purchaser. As rightly pointed out by the Court of Appeal, the law on the concept of indefeasibility was settled and well established by case law. There was merit in the findings of the Court of Appeal that the first respondent had F derived its interest in the charged land from the chargor, Wong, and not the appellant bank. The appellant's interest in the property had been extinguished by the forged discharge resulting in Wong becoming the immediate purchaser. Thus, the Court of Appeal was correct in finding that the first respondent derived its interest in the land from the charge G executed by Wong. Since the first respondent was a chargee, it became a holder of a subsequent interest in the land and thus, was protected by the proviso of s 340(3) of the NLC. In the circumstances, a chargee would clearly come within the meaning of purchaser under the proviso to s 340(3) of the NLC (see paras 19, 23 & 32–35).

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(2) **(per Jeffrey Tan FCJ, dissenting)** In the present appeal the issue was not whether the first respondent bank was a purchaser, but whether it was an immediate or subsequent purchaser. Registration of the charge in favour of the first respondent, which was based on forged and invalid documents, was defeasible under s 340(2)(b) of the NLC. Forgery per se I suffices to render a registered title defeasible, irrespective of the knowledge of the first respondent. Thus, Wong, who procured the title by the forged discharge of charge and forged document of title could not be an immediate purchaser. Also, the overall conduct of Wong when viewed as a whole was criminal and as such there could be no question

that Wong defrauded the appellant of its charge. Even if Wong could be a purchaser, he was not a purchaser in good faith and therefore could not be the immediate purchaser in good faith and for valuable consideration. Thus, although a chargee was a purchaser within the meaning of the proviso, the interest on a charge was defeasible, if the chargee was not a subsequent purchaser in good faith and for valuable consideration. Whether a purchaser was an immediate or subsequent purchaser was not determined by a tally of the number of transactions. For the title or interest of the subsequent purchaser to be indefeasible, both immediate and subsequent purchasers should be purchasers in good faith and for valuable consideration. In the instant case, as there was no immediate purchaser in good faith and for valuable consideration, the first respondent's interest in the land was immediate and defeasible (see paras 69–71, 77–78 & 87–91).

[Bahasa Malaysia summary

Pada 23 Mac 2006, seorang bernama Ching Ting Seng dan Ching Chong Lup ('Ching'), pemilik sebidang tanah terletak di Klang ('tanah'), melaksanakan satu gadaian atas tanah bagi pihak Southern Bank Bhd ('SBB') sebagai jaminan untuk kemudahan perbankan. Perniagaan SBB kemudian telah diletakhak kepada CIMB Bank Bhd ('perayu'). Seorang bernama Wong Chee Keong ('Wong') memasuki satu perjanjian untuk membeli tanah daripada Ching. Pada 14 November 2008, Wong memohon satu pinjaman daripada AmBank (M) Bhd ('responden pertama') untuk membiayai pembelian tanah. Tanah itu digunakan sebagai jaminan untuk pinjaman. Peguamcara bagi pihak bank responden pertama melakukan carian hartanah yang berkaitan, membuat pertanyaan yang sewajarnya dan memperoleh semua akujanji dan pengesahan daripada peguamcara yang bertindak dalam transaksi belian dan jualan antara Ching dan Wong. Peguamcara kemudian meneruskan untuk menyediakan dokumen yang perlu termasuk pembentukan gadaian atas tanah bagi pihak responden pertama. Pada 25 November 2009, pejabat tanah melaksanakan pelepasan gadaian ke atas gadaian perayu dan mendaftar Wong sebagai pemilik berdaftar tanah. Dengan itu, responden pertama telah didaftarkan sebagai pemegang gadaian terhadap tanah. Ia kemudiannya didapati bahawa penyingkiran perayu sebagai pemegang gadaian dan pendaftaran responden pertama sebagai pemegang gadaian terhadap tanah telah dilakukan dengan cara pemalsuan dokumen dan bahawa terdapat dua hakmilik terhadap tanah. Tuntutan oleh perayu dan responden pertama sebagai pemegang gadaian menjadi pertikaian utama dalam kes ini. Berdasarkan dapatannya bahawa pelepasan gadaian adalah palsu, mahkamah perbicaraan memutuskan bahawa s 278 Kanun Tanah Negara ('KTN') tidak dipenuhi untuk melaksanakan pelepasan gadaian terhadap tanah tersebut, dan bahawa responden pertama sebagai pembeli terus tidak berhak terhadap perlindungan di bawah peruntukan s 340(3) KTN. Oleh itu, Mahkamah Tinggi membuat keputusan berpihak kepada perayu. Atas rayuan, Mahkamah Rayuan memutuskan

A bahawa responden pertama adalah pembeli terus yang kepentingannya dilindungi oleh peruntukan s 340(3) KTN menurut prinsip ketidakbolehan disangkal tertunda. Oleh itu, Mahkamah Rayuan membenarkan rayuan responden pertama. Perayu telah memperoleh keizinan untuk meneruskan dengan rayuan ini. Rayuan ini beralih kepada isu sama ada seorang pemegang B gadaian terangkum dalam maksud 'purchaser' di bawah peruntukan s 340(3) KTN. Dalam rayuan ini, perayu mengemukakan bahawa Wong, penggadai, hanya memperoleh hakmilik boleh dikalahkan terhadap tanah yang mana adalah bertanggungan untuk diketepikan dalam s 340(2)(b) KTN. Perayu kemudian mempertikaikan bahawa memandangkan ia telah dibuktikan C bahawa Wong tidak memperoleh hakmilik terhadap tanah, dia tidak boleh didapati untuk memberikan apa-apa gadaian terhadap hakmilik yang dicemari itu. Maka, gadaian yang dibuat oleh Wong bagi pihak responden pertama sepatutnya diketepikan.

D **Diputuskan,** menolak rayuan dengan kos:

(1) **(oleh Raus Sharif Ketua Hakim Negara, majoriti)** Isu untuk penentuan Mahkamah Tinggi dan Mahkamah Rayuan adalah sama ada responden pertama adalah pembeli terus atau kemudian. Walau E bagaimanapun, kedua-dua mahkamah tidak mencapai keputusan yang sama. Mahkamah Tinggi mendapati responden pertama adalah pembeli terus, manakala Mahkamah Rayuan mendapati responden pertama adalah pembeli kemudian. Seperti yang dinyatakan dengan jelas oleh Mahkamah Rayuan, undang-undang mengenai konsep F ketidakberdayaan telah diselesaikan dan dibuktikan oleh kes undang-undang. Terdapat merit dalam dapatan Mahkamah Rayuan bahawa responden pertama telah memperoleh faedahnya di tanah gadaian dari penggadai, Wong, dan bukan bank perayu. Faedah perayu dalam harta itu telah dibatalkan oleh pelepasan gadaian palsu yang G menyebabkan Wong menjadi pembeli terus. Maka, Mahkamah Rayuan adalah betul dalam membuat dapatan bahawa responden pertama memperoleh faedahnya dari tanah daripada gadaian yang dilaksanakan oleh Wong. Memandangkan responden pertama adalah pemegang gadaian, ia menjadi pemegang faedah kemudian dalam tanah dan oleh H itu, adalah dilindungi oleh peruntukan s 340(3) KTN. Dalam keadaan ini, seorang pemegang gadaian jelas akan terangkum dalam maksud pembeli di bawah peruntukan s 340(3) KTN (lihat perenggan 19, 23 & 32–35).

I (2) **(oleh Jeffrey Tan HMP, menentang)** Dalam rayuan ini isu bukanlah sama ada responden pertama adalah pembeli, tetapi sama ada ia adalah pembeli terus atau kemudian. Pendaftaran gadaian yang memihak responden pertama, yang berasaskan pemalsuan dan dokumen tidak sah, adalah boleh dikalahkan di bawah s 340(2)(b) KTN. Pemalsuan sahaja cukup untuk menyebabkan satu hakmilik berdaftar dikalahkan, tanpa

mengira pengetahuan responden pertama. Maka, Wong, yang memperoleh hakmilik melalui pemalsuan pelepasan gadaian dan memalsukan dokumen hakmilik tidak boleh menjadi pembeli terus. Dan, kelakuan keseluruhan Wong apabila dilihat secara menyeluruh adalah bersifat jenayah dan dengan itu tiada soalan bahawa Wong telah melakukan fraud terhadap perayu akan gadaiannya. Jika pun Wong boleh menjadi pembeli, dia bukanlah pembeli suci hati dan oleh itu tidak boleh menjadi pembeli terus dengan suci hati dan balasan berharga. Oleh itu, walaupun pemegang gadaian adalah pembeli terangkum dalam maksud peruntukan, faedah terhadap gadaian boleh dikalahkan, jika pemegang gadaian bukanlah pembeli kemudian dengan suci hati dan balasan berharga. Sama ada pembeli adalah pembeli terus atau kemudian tidak ditentukan dengan jumlah bilangan transaksi. Untuk hakmilik atau faedah pembeli kemudian tidak boleh dikalahkan, kedua-dua pembeli terus dan kemudian hendaklah menjadi pembeli suci hati dan balasan berharga. Dalam kes ini, kerana tiada pembeli terus dengan suci hati dan balasan berharga, faedah responden pertama dalam tanah adalah serta-merta dan boleh dikalahkan (lihat perenggan 69–71, 77–78 & 87–91).]

Notes

For cases on indefeasibility of title and interests in general, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3725–3902.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241, FC (refd)

Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136, CA (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1995] 2 MLJ 863, HC (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (refd)

Daito Kogyo (Sarawak) Sdn Bhd v Port Dickson Land Development Sdn Bhd [2001] 2 MLJ 531, HC (refd)

Dial Kaur a/p Tara Singh v Mann Foong Realty Sdn Bhd [2000] 3 MLJ 153, CA (refd)

Development & Commercial Bank Bhd, Johore Bahru v Kim Ming Choon [1991] 2 MLJ 246; [1991] 1 CLJ 732, HC (refd)

Gibbs v Messor & Co [1891] AC 248, PC (refd)

Heveaplast Marketing Sdn Bhd v See Leong Chye @ Sze Leong Chye & 3 Others and other appeals [2016] MLJU 835; [2017] 2 CLJ 43, CA (refd)

Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener) [2015] 4 MLJ 166, FC (refd)

Home Trust Co v Zivic (2006) 277 DLR (4th) 349 (refd)

Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768; [2014] 1 CLJ 987; [2014] 2 MLRA 432, FC (refd)

Kasai Reiko v Annie Lor Lee Fong & Ors (Public Bank Bhd, intervener) [2014] 7 MLJ 652, HC (refd)
Kuala Lumpur Finance Bhd v Yap Poh Khian (Teo Sik Eng & Anor, interveners) [1992] 1 MLJ 472, HC (refd)
Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294, SC (refd)
Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266, FC (refd)
Malayan United Finance Bhd v Tay Lay Soon [1991] 1 MLJ 504, SC (refd)
Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan [1990] 1 MLJ 317, HC (refd)
Malaysia Building Society Bhd v KCSB Konsortium Sdn Bhd [2017] 2 MLJ 557, FC (refd)
OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim [1999] 2 MLJ 511; [1999] 2 CLJ 949, CA (refd)
Ong Ban Chai & Ors v Seah Siang Mong [1998] 3 MLJ 346, CA (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)
Public Bank Bhd v Phan Seng Kee & Ors [1991] 3 CLJ 2560, HC (refd)
Rajamani a/p Meyappa Chettiar v Eng Beng Development Sdn Bhd & Ors [2016] 3 MLJ 660; [2016] 4 CLJ 510, CA (refd)
Score Options Sdn Bhd v Mexaland Development Sdn Bhd [2012] 6 MLJ 475, FC (refd)
State Tailor Sdn Bhd v Nallapan [2005] 2 MLJ 589, CA (refd)
T Damodaran v Choe Kuan Him [1979] 2 MLJ 267b, PC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (refd)
Taylor v Land Mortgage Bank of Victoria Ltd (1886) 12 VLR 748 (refd)
Teh Cheng Choo v Malayan Banking Bhd [2009] 5 CLJ 463, CA (refd)
The Bank of Nova Scotia Berhad v Saunah binti Kasni [2015] MLJU 917; [2016] 1 CLJ 505, HC (refd)
Wright v Lawrence (2007) 278 DLR (4th) 698 (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 108(3)(e)
Companies Act 2016
National Land Code ss 5, 205, 205(1), 206, 214, 221, 241, 267(1)(a), 278, 282, 294(2), 306(a), 340, 340(1), (2), (2)(a), (2)(b), (2)(c), (3), Parts Fourteen, Fifteen, Sixteen, Seventeen

Appeal from: Civil Appeal No B-01(NCVC)(W)-327–08 of 2014 (Court of Appeal, Putrajaya)

Karen Wilfred (Rashid Zulkifli) for the appellant.
Benjamin John Dawson (Koh San Tee and Chan Shao Kang with him) (Benjamin Dawson) for the first respondent.
Nik Suhaimi Nik Sulaiman (Naziah Mokhtar with him) (Selangor State Legal Adviser, Selangor State Legal Office) for the second and third respondents.

Raus Sharif Chief Justice (delivering majority judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the Court of Appeal given on 30 September 2015 in reversing the decision of the High Court. The High Court had on 8 July 2014 found in favour of the appellant ('CIMB') in respect of competing claims with the first respondent ('AmBank') over their respective charges on the same piece of land.

[2] Leave to appeal to this court was granted to the appellant on 17 September 2016 on a single question of law which reads:

> Whether a chargee comes within the meaning of 'purchaser' under the proviso to s 340(3) of the National Land Code.

[3] For ease of reference, we will refer the parties in this appeal as they were referred to at the High Court.

BACKGROUND FACTS

[4] Chin Ting Seng and Chin Chong Lup ('the Chins') were at the material time, owners of a piece of land situated at Seksyen 21, Mukim Bandar Klang, District of Klang, State of Negeri Selangor ('the property'). On 23 March 2006, the Chins had executed a charge on the property in favour of Southern Bank Bhd ('SBB') as security for a banking facility. On 6 September 2006, the banking business of SBB was vested with CIMB.

[5] On 4 November 2008, one Wong Chee Keong ('Wong') applied for a loan from AmBank to finance the purchase of the property which would be used as a security for the loan ('the AmBank charge'). AmBank appointed Messrs KK Lim & Assoc ('KKL') as their solicitors to prepare the necessary documentation including the creation of the charge over the property in favour of AmBank. KKL conducted the relevant property searches, made the appropriate enquiries and also obtained all the necessary undertakings and confirmations from the solicitors acting in the sale and purchase transaction between the Chins and Wong.

[6] The firm of solicitors acting for Wong was Messrs Ku Abdul Rahman & Assoc ('KAR'). On 11 February 2009, by way of a letter, KAR informed KKL of the followings:

(a) the differential sum between the balance purchase price and the loan sum had been settled by Wong;

(b) the vendors ie the Chins had settled the outstanding loan due to CIMB and they were awaiting the original title deed and duly executed discharge of charge to be released by CIMB; and

(c) KAR undertook to forward to KKL the duly adjudicated and stamped memorandum of transfer ('the MOT') together with the original title deed and the discharge of charge.

[7] On 10 March 2009, KKL received from KAR:

(a) the original deed of the property (IDT version 6);

(b) the duly stamped MOT; and

(c) the discharge of charge of the CIMB charge.

[8] On 17 March 2009, KKL received from KAR the duplicate of the CIMB charge forwarded on a letter dated 16 March 2009. On 19 March 2009, KKL presented, inter alia, the discharge of CIMB's charge, the MOT, and the AmBank charge together with the IDT version 6 ('the security documents'), at the land office.

[9] On 7 April 2009, KKL on behalf of AmBank forwarded a cashier's order No 724209 for RM1,910,000 being the balance purchase price to KAR. On 7 April 2009, KAR credited the balance purchase price into their account maintained with Al-Rajhi Bank.

[10] On 25 November 2009, the land office effected the discharge of CIMB's charge and registered Wong as the registered proprietor of the property. Thereupon AmBank was registered as the chargee of the property.

[11] It was discovered later that the discharge of the CIMB's charge was forged. There were two titles over the property. The claims by CIMB and AmBank as chargees over the same property became the core of the dispute in this case.

AT THE COURTS BELOW

[12] On 8 July 2014, the High Court decided in favour of CIMB. The trial judge ruled that AmBank was an immediate purchaser and hence their interest

was not protected by the principle of deferred indefeasibility. In other words, AmBank being an immediate purchaser was not entitled to the protection under the proviso of s 340(3) of the National Land Code ('the NLC'). The trial judge said it in the following words:

> In view of my finding that the said discharge of the charge and the signature on the same was forged, the purported transfer of interest from the plaintiff (CIMB) to the first defendant (AmBank) is one of immediate indefeasibility and the proviso of sub-s 3 of s 340 of the NLC do not apply and s 340(2)(b) of the NLC would kick in and the interest of the first defendant (AmBank) would not be indefeasible and would be liable to be set aside. The first defendant (AmBank) was the immediate holder of the charges and that being the case, the first defendant (AmBank) cannot take advantage of the proviso of sub-s 3 of s 340 of the NLC.

[13] On 30 September 2015, the Court of Appeal allowed AmBank's appeal. The Court of Appeal held that AmBank was a subsequent purchaser whose interest was protected by the proviso of s 340(3) of the NLC in accordance with the deferred indefeasibility principle.

DECISION OF THIS COURT

[14] The only question that calls for our determination was whether a chargee comes within the meaning of 'purchaser' under the proviso of s 340(3) of the NLC. Thus, if a chargee does not come under the meaning of purchaser, then AmBank was an immediate purchaser and in such a situation AmBank's interest as chargee was not protected by the principle of deferred indefeasibility. However, if a chargee comes within the meaning of purchaser, then AmBank was a subsequent purchaser, and thus was protected by s 340(3) of the NLC.

[15] This concept of indefeasibility of title or interest is found in s 340 of the NLC which reads as follows:

> 340 Registration to confer indefeasible title or interest, except certain circumstances
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> (1) The *title or interest* of any person or body for the time being registered as proprietor of any land, or in whose name, any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible
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> (2) The *title or interest* of any such person or body shall not be indefeasible:
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> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy;
>
> (b) where the registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the *title or interest* was unlawfully acquired by the person or

A body in the purported exercise of any power or authority conferred by any written law.

(3) Where the *title or interest* of any person or body is defeasible by reason of any of the circumstances specified in subsection 2:

B (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

C Provided that nothing in this subsection shall effect any *title or interest* acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

D (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

E (b) the determination of any title or interest by operation of law.

[16] Section 340 of the NLC referred to indefeasibility of title or interest. Section 340(1) of the NLC itself provides a clear understanding that interest means lease, charge or easement. In fact, the Privy Council in *T Damodaran v* F *Choe Kuan Him* [1979] 2 MLJ 267b had occasion to consider the scope and meaning of 'interest' under the NLC. Lord Diplock who delivered the judgment of the court said:

interest in land, short of proprietorship, which are capable of being registered are *leases, charges and easements*. (Emphasis added.)

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[17] Similarly, this court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 had described the legal position of a chargee as a holder of interest in land. Arifin Zakaria CJ (Malaya) (as he then was) held:

H However, we are of the opinion that the appellant bank (which is a chargee), being the holder of subsequent interest in the land is protected by the proviso to s 340(3) of the NLC.

[18] The above view of Arifin Zakaria CJ (Malaya) (as he then was) is I consistent with the definition of 'purchaser' in s 5 of the NLC as:

a person or body who in good faith and for valuable consideration acquires title to, or any interest in land.

Clearly, the definition of purchaser in s 5 is not limited to the purchaser who acquires the title to land but includes those who has acquires interest in land.

[19] In fact, this issue whether a chargee comes within the meaning of purchaser in the proviso of s 340(3) of the NLC was not decided upon by the courts below. The sole issue determined by the High Court and the Court of Appeal was whether AmBank was an immediate or a subsequent purchaser. It is also important to note that the courts below did not make any finding that AmBank was not a bona fide purchaser or chargee. On the contrary, the trial judge had in his grounds of judgment found that AmBank and their solicitors (KKL) had acted properly and diligently. The trial judge said:

> AmBank appointed Messrs KK Lim & Assoc ('KKL') as their solicitors for the financing transaction. Their duties, inter alia, entails the preparation of the security documents, namely the creation of a charge over the property in favour of AmBank. KKL conducted the relevant searches, made the appropriate enquiries, and also obtained all the necessary undertakings and confirmation from the solicitors acting in the sale and purchase agreement between the Chings and Wong.

[20] The Court of Appeal also did not find that there was any lack of bona fide on the part of AmBank. As stated earlier, the Court of Appeal proceeded with the appeal on the sole issue of whether the AmBank was an immediate or a subsequent purchaser. They found that AmBank was a subsequent purchaser and protected by s 340(3) of the NLC.

[21] Before us, the arguments put forward by learned counsel for the appellant (CIMB) may be summarised as follows. Wong, the chargor only acquired defeasible title to the property which is liable to be set aside within s 340(2)(b) of the NLC. Once it is established that Wong acquired no title to the property, he cannot be found to have given any charge on such impugned title. Hence, the charge created by Wong in favour of AmBank, which is dependent on the validity of the title of the chargor, must necessarily be set aside. The legal title to the property is presently registered in the name of Wong and following the principle enunciated by the Supreme Court in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, Wong has not abrogated his right to AmBank's charge. No judicial sale has taken place in respect of the property and following s 267(1)(a) of the NLC, no title or interest of the chargor, namely Wong, has passed or vested in a third party. In support, learned counsel cited the Court of Appeal case of *OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim* [1999] 2 MLJ 511; [1999] 2 CLJ 949 as the authority.

[22] It was further submitted that in the present case, AmBank's charge was registered with the presentation of the forged discharge of charge form and forged issue document of title (version 6). Thus, to uphold AmBank's

contention that the charge is valid and indefeasible as a subsequent purchaser within the proviso to s 340(3) of the NLC would be a return to the position propounded by this court in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241, where a purchaser obtained good title notwithstanding the title was procured by the presentation of a forged instrument of transfer. And the decision in *Adorna Properties* having been expressly overruled by this court in *Tan Ying Hong* as being per incuriam on the point that the proviso to s 340(3) of the NLC of a bona fide purchaser for value was available as a defence for the immediate holder of registered title effected by means of fraud or forgery.

[23] With respect, we are unable to subscribe to the said arguments. As rightly pointed out by the Court of Appeal, the law on the concept of indefeasibility was settled and well established when the judgment of this court in *Adorna Properties* was overruled by *Tan Ying Hong*. In order to appreciate the decision of this court in *Tan Ying Hong* which basically overruled *Adorna Properties*, it is necessary to reveal as to what actually transpired in *Adorna Properties*.

[24] In *Adorna Properties*, Mrs Boonsom Boonyanit a Thai national owned two pieces of land in Tanjong Bungah, Penang. A rogue forged her signature, sold and subsequently transferred her two pieces of land to Adorna Properties. She discovered the fraud only after Adorna Properties was registered as the owner of the two pieces of land. She brought an action against Adorna Properties in order to have her name restored on the register as the owner of the property. During the trial, Adorna Properties argued that as an innocent third party purchaser for value, its title was indefeasible notwithstanding the forged signature on the memorandum of transfer and relied on s 340 of the Code.

[25] The High Court in interpreting the above provisions held that even if the instrument of transfer was forged, Adorna Properties had nevertheless acquired an indefeasible title over the property by virtue of s 340(3) of the Code, which protects any title or interest acquired by any purchaser in good faith and for valuable consideration (see *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1995] 2 MLJ 863). Hence, the High Court ruled in favour of Adorna Properties.

[26] The Court of Appeal interpreted the above provisions differently (see *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62). The Court of Appeal held that the words 'any purchaser' in s 340(3) of the Code refers to a subsequent and not to an immediate purchaser. Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal held (at pp 85–86):

> ... the words 'any purchaser' appearing in the proviso to s 340(3) do not include a registered proprietor whose immediate title is rendered defeasible by one or more of

the vitiating elements specified in the second subsection to s 340 of the Code. Any other construction would, in our view, denude sub-s (2) of all effect. The section should be read as making defeasible the title of a proprietor who gets onto the register by means of one or more of the methods specified in the second subsection. However, if such a registered proprietor were to dispose of the land to a third party who, in good faith, pays the purchase price, then, the latter, as well as all those who come onto the register after him, take title free of any taint.

[27] Accordingly, the Court of Appeal decided in favour of Mrs Boonsom Boonyanit. However the Federal Court overruled the decision of the Court of Appeal. Eusoff Chin CJ reasoned as follows (at p 246):

The proviso to sub-s (3) of s 340 of the NLC dealt with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s (3) this category of registered proprietors so that these proprietors are not caught by main provision of this subsection. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediately indefeasibility notwithstanding that they acquired their titles under a forged document.

We therefore, agree with the High Court judge that, on the facts of this case, even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said lands.

[28] This court in *Tan Ying Hong*, held that the Federal Court in *Adorna Properties* had misconstrued s 340(1), (2) and (3) of the NLC and came with erroneous conclusion that the proviso appearing in sub-s (3) equally applied to sub-s (2). Arifin Zakaria CJ (Malaya) put it in the following:

49. The question is, does the proviso following immediately after sub-s (3), apply to the other provisions of s 340, in particular to sub-s 2(b). This can only be deduced from the proviso itself. NS Bindra's, *Interpretation of Statutes*, 9th Ed, at p 110 states that: 'A proviso is something engrafted on a preceding enactment. The proviso follows the enacting part of a section and is in a way independent of it. Normally, it does not enlarge the section, and in most cases, it cuts down or makes an exception from the ambit of the main provision'. A proviso to a subsection would not apply to another subsection (*M/s Gajo Ram v State of Bihar* AIR [1956] Pat 113). A proviso carves out an exception to the provision immediately preceding the proviso and to no other (*Ram Narain Sons Ltd v Ass Commr of Sales Tax* AIR [1955] SC 765).

[29] With regard to the proviso to sub-s 3, Arifin Zakaria CJ (Malaya) went on to hold:

51. We are of the view that the proviso is directed towards the provision of sub-s (3) alone and not to the earlier subsection. This in our view is supported by the use of words 'in this subsection' in the proviso. Therefore, its application could not be

projected into the sphere or ambit of any other provisions of s 340.

[30] Arifin Zakaria CJ (Malaya) went further to explain:

> 52. Furthermore, eventhough sub-s (3)(a) and (b) refer to the circumstances specified in sub-s (2) they are restricted to sub-sequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s (3) ought not to be extended as was done by the court in *Adorna Properties*, to apply to sub-s (2)(b). By so doing the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.
>
> 53. For the above reasons, with respect, we hold that the Federal Court in *Adorna Properties* had misconstrued s 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s (3) equally applies to sub-s (2). By so doing the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s 340 of the NLC.

[31] This concept of indefeasibility was further explained by this court in the case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987; [2014] 2 MLRA 432 where Jeffrey Tan FCJ said:

> [41] Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to the trial courts. Whenever a registered title or interest is sought to be set aside under s 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, the bona fide of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s 340(2) had been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s 340(2) would not affect the title or interest of a bona fide subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a bona fide subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith for a valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.

[32] This was exactly what the courts below did in the present case. But they came to different conclusions. The High Court found AmBank as an immediate purchaser while the Court of Appeal found Ambank as the

subsequent purchaser. Basically, the Court of Appeal agreed with learned counsel from AmBank that the trial judge in deciding that AmBank was an immediate purchaser had failed to appreciate the following:

(a) AmBank had derived interest as chargee of the property from Wong and not CIMB;

(b) CIMB's charge was discharged before Wong was registered as the proprietor of the property; and

(c) the financing of the property involved a two stage transaction.

[33] Thereafter, the Court of Appeal went on to hold:

> [26] We found merits in the aforesaid contention and our reasons were these. As pointed out by learned counsel, the sequence of presentation of the dealing on 25 November 2009 was as follows:
>
> (a) the lodgment of the discharge of CIMB's charge via Form 16N;
>
> (b) then the lodgment of the memorandum of transfer from Chings to Wong; and
>
> (c) finally the lodgment and registration of AmBank's charge.
>
> [27] Though the above dealings were on the same day and were done simultaneously, it cannot be disputed nor can we ignore the fact that the lodgment of the AmBank's charge could not have been created until the first two steps had been executed. That being the case, the only way AmBank obtained their interest was from Wong and not CIMB. CIMB's interest in the property had been extinguished by the forged discharge resulting in Wong becoming the immediate purchaser. AmBank then derived their interest in the property from the charge executed by Wong. Under such circumstances, there cannot be any relationship between CIMB and AmBank, and hence the learned judge, with respect, erred when he said 'it is clear that the relationship between the plaintiff (CIMB) and the first defendant (AmBank) was that of an immediate purchaser and not a subsequent purchaser ...'. When AmBank became the chargee from Wong's memorandum of charge, AmBank became the subsequent purchaser.
>
> [28] Further, we said that the fact that Wong's interest being an immediate purchaser was defeasible by CIMB did not, in our view, affect the indefeasibility of AmBank's interest. Our view is supported by the two decisions of the apex court, namely *Kamarulzaman Omar & Ors v Yakub Husin & Ors* [2014] 2 MLJ 768; [2014] 2 MLRA 432; [2014 1 CLJ 987 and *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 1 MLRA 1; [2010] 2 CLJ 269.

[34] We are in total agreement with the reasoning of the Court of Appeal. AmBank must be a subsequent purchaser. As discussed earlier, AmBank, being a chargee was a holder of subsequent interest in the property and thus, was protected by the proviso of s 340(3) of the NLC.

[35] We therefore answer the question posed to this court in the affirmative. Clearly, a chargee comes within the meaning of purchaser under the proviso to s 340(3) of the NLC. Accordingly, we dismiss the appeal with costs.

Jeffrey Tan FCJ (delivering minority judgment of the court):

[36] This is an appeal against the decision of the Court of Appeal who reversed the decision of the trial court and held that the charge of the first respondent over land held under GM7794 for Lot 23223 Seksyen 21 Mukim Bandar Klang, District of Klang, Selangor ('said land') was indefeasible and thus prevailed over the prior charge in favour of the appellant.

[37] The following background facts are not in dispute. By a loan agreement dated 17 March 2006, Southern Bank Bhd ('SBB') granted loan facilities to one Ching Ting Seng and Ching Chong Lup ('the Chings'). As security for the loan, the Chings executed a charge of the said land, which was registered on 23 March 2006, in favour of SBB. On 6 September 2006, the business of SBB was vested unto the appellant.

[38] On 14 November 2008, one Wong Chee Kong ('Wong') applied for a loan from the first respondent to finance his purchase of the said land, with the said land as the security. The first respondent appointed Messrs KK Lim & Assoc ('KK Lim') to prepare the charge of the said land in favour of the first respondent. Messrs Ku Abdul Rahman & Assoc ('Ku Abdul Rahman') prepared the sale and purchase agreement between the Chings and Wong. Later, Ku Abdul Rahman informed KK Lim that Wong had settled the differential sum between the purchase price and the loan sum and that the Chings had settled the loan sum due to the appellant and were awaiting receipt of the original document of title and the discharge of charge. Ku Abdul Rahman gave an undertaking to forward the duly adjudicated and stamped memorandum of transfer together with the original document of title and discharge of charge to KK Lim.

[39] On 10 March 2009, KK Lim received from Ku Abdul Rahman the purported document of title (version 6) of the said land, the duly stamped memorandum of transfer of the said land, and the purported discharge of charge executed by the appellant. On 17 March 2009, KK Lim received what purported to be the duplicate charge from Ku Abdul Rahman. On 19 March 2009, KK Lim presented the purported discharge of charge, the memorandum of transfer by the Chings to Wong, and the memorandum of charge by Wong in favour of the first respondent together with what purported to be the original document of title (version 6) ('the security documents') for registration.

[40] On 7 April 2009, the first respondent, through KK Lim, forwarded a cashier's order No 724209 for RM1,910,000, it being the purported balance purchase price, to Ku Abdul Rahman who credited that sum into its account. A

[41] Upon enquiry on 17 September 2009, KK Lim was informed that the security documents were rejected for registration by reason of the letter of Ku Abdul Rahman dated 30 March 2009. On 25 November 2009, the security documents were again presented for registration. This time, the registering authority registered the purported discharge of charge, the transfer by the Chings to Wong, and the charge by Wong in favour of the first respondent. B C

[42] On or about 2 May 2012, the appellant commenced proceedings to declare the charge in favour of the first respondent as null and void, and to reinstate its charge of the said land. That was followed by the counterclaim of the first respondent against the registering authority, for breach of duty. D

[43] After a full trial, without Wong as litigant or witness, the trial court found: (i) 'as a fact that the discharge of charge purportedly signed by the (the appellant) had been forged'; (ii) the purported document of title (version 6) was not issued by the registering authority; and (iii) the registering authority was negligent to have acted on the version 6 document of title. The trial court additionally found 'that (Wong) created a charge of the said land by forging the signature of the attorney of the (the appellant) and registering the same as a discharge of charge to enable the current charge over the said land in favour of the (first) respondent to be registered'. E F

[44] The Court of Appeal agreed that 'at the trial it was established that the discharge of charge had been forged'. Both courts below held that the discharge of charge was a forgery. But the courts below differed as to whether the respondent was an immediate or a subsequent purchaser. G

[45] The trial court stated that s 340 of the National Land Code ('the NLC') 'affords protection to a subsequent purchaser'. The trial court was of the view that 'the position of the ('the first respondent') vis a vis the ('the appellant'), in my view is that the (the first respondent) is not a subsequent purchaser but a direct purchaser of the interest registered as a charge for the creation of a charge in favour of the (the first respondent), based on a discharge of charge purportedly executed by the (the appellant) (which is denied) which then allowed a charge to be registered in the name of the (the first respondent). It follows therefore that the (the first respondent) is an immediate purchaser of the interest and is subject to immediate indefeasibility. This however is liable to be set aside in the event (that) s 340 sub-s (2)(b) has been breached'. Given its finding that the discharge of charge was a forgery, the trial court went on to hold that s 278 of the NLC had not been complied to effect a discharge of the H I

said land, and that the charge in favour of the first respondent should be set aside.

[46] Before the trial court, the first respondent argued that the first respondent was a purchaser in good faith and for valuable consideration, and that the proviso (proviso) to sub-s (3) of s 340 of the NLC applied, as the immediate purchaser, Wong, and the creation of the charge had put the first respondent in the position of a subsequent purchaser. But the trial court held that given that the discharge of charge was a forgery and that s 278 of the NLC had not been complied, all issue of the first respondent being a subsequent purchaser could not arise and that the proviso could not apply.

[47] At p 17 of its judgment, the trial court thus enunciated on the defeasibility or indefeasibility of title of the first respondent:

> In view of my finding that the said discharge of charge and the signature on the same were forged, the purported transfer of interest from the (the appellant) to the (the first respondent) is one of immediate indefeasibility and the proviso in sub-s (3) of 340 of the NLC does not apply, and 340(2)(b) of the NLC would kick in and the interest of the (the first respondent) would not be indefeasible and would be liable to be set aside.
>
> The (the first respondent) was the immediate holder of its charge and that being the case, the (the first respondent) cannot take advantage of the proviso ...

[48] The trial court granted the orders sought by the appellant against the first respondent and the orders sought by the first respondent against the registering authority.

[49] At the Court of Appeal, the first respondent submitted that the trial court failed to appreciate that the first respondent derived interest from Wong and not the appellant, that the charge in favour of the appellant was discharged before Wong was registered as proprietor, and that 'the financing of the property involved a two stage transaction'.

[50] The Court of Appeal expressed total agreement with the latter submission of the first respondent:

> We found merit in the aforesaid contention and our reasons were these. As pointed out by learned counsel, the sequence of presentation of the dealing on 25 November 2009 was as follows:
>
> (a) the lodgement of the discharge of CIMB's charge via Form 16N.
>
> (b) then the lodgement of the memorandum of transfer from the Chings to Wong; and
>
> (c) finally the lodgement and registration of Ambank's charge.

Though the above dealings were on the same day and were done simultaneously, it cannot be disputed nor can we ignore the fact that the lodgement of the AmBank's charge could not have been created until the first two steps had been executed. That being the case, the only way AmBank obtained their interest was from Wong and not from CIMB. CIMB's interest in the property had been then extinguished by the forged discharge resulting in Wong becoming the immediate purchaser. AmBank then derived their interest in the property from the charge executed from Wong. Under such circumstances, there cannot be any relationship between CIMB and AmBank, hence the learned judge, with respect, erred when he said '... it is clear that the relationship between the Plaintiff (CIMB) and the 1st Defendant (AmBank) was that of an immediate purchaser and not a subsequent purchaser ...'. When AmBank became the chargee from Wong's memorandum of charge, AmBank became the subsequent purchaser.

Further, we said that the fact that Wong's interest being an immediate purchaser was defeasible by CIMB did not, in our view, affect the indefeasibility of AmBank's interest. Our view is supported by two decisions of the apex court, namely *Kamarulzaman Omar & Ors v Yakub Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987 and *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1.

[51] For those reasons, the Court of Appeal allowed the intermediate appeal and set aside all orders of the trial court.

[52] The appellant obtained leave to appeal to this court on the following question of law:

Whether a chargee comes within the meaning of 'purchaser' under the proviso to s 340(3) of the National Land Code?

[53] Before us, the appellant submitted as follows. The question of law ought to be answered in the negative. A chargee cannot be regarded as a subsequent purchaser. A charge is subservient to the title to the land. Where the chargor's title is defeasible, he cannot create any interest in favour of a third party. The first respondent could not be a subsequent purchaser and was not entitled to the proviso, as the first respondent's charge, which could not subsist on its own, was dependent on the title of Wong who was the fraudster and who acquired no title whatsoever by the presentation of false instruments. The first respondent's charge, being a derivative interest from a title obtained by forgery, was tainted with the same forgery. The defeasibility of title to the said land rendered the charge created out of such defeasible title also defeasible and liable to be set aside. The charge of the first respondent was defeasible because its registration was obtained by forged documents. The case was not within the proviso, even if the first respondent were innocent. Whether the first respondent was complicit in the forgery was irrelevant. The following could be concluded from the undisputed facts: (a) the discharge of charge was a forgery, and its registration was void ab initio; (b) the transfer of the said land and the charge were registered on the basis of the forged discharge of charge; (c) a

forged document of title was used to procure registration of the transfer and the charge; (d) the appellant had not parted with possession of the document of title (version 2) and the duplicate charge; (e) consequently, registration of the transfer to Wong and the charge in favour of the first respondent were procured by forged documents and were void ab initio; (f) the document of title (version 3) in the possession of the first respondent was tainted with illegality, as it was procured by the presentation of forged instruments with a forged *pelan tanah*. The argument that the first respondent was a subsequent purchaser in good faith and for valuable consideration and the attempt to separate the two transactions, namely, the transfer by the Chings to Wong on the one part and the charge in favour of the first respondent of the other part, was untenable for the following reasons: (i) removal of the appellant as chargee and registration of the first respondent as chargee were carried out in one continuous transaction together with the transfer of the said land by means of forged documents; (ii) the charge in favour of the first respondent could not have been registered but for the forged discharge of charge and forged document of title (version 6); (iii) the document of title (version 3) in the possession of the first respondent was issued on 21 December 2009, that is, after creation of the charge in favour of the first respondent on 25 November 2009, as a direct consequence of the registration of forged instruments; (iv) *Tan Ying Hong* at para [26] was inconsistent with itself at paras [8], [10] and [11]; (v) the first respondent failed to properly investigate the circumstances of the sale from the Chings to Wong; a search would have revealed that there were pending foreclosure proceedings and that the appellant had an interest in the said land. The argument that the first respondent was a subsequent purchaser in good faith and for valuable consideration was unmaintainable, as Wong, who procured title by forged documents from which he created a charge in favour of the first respondent, acquired no title to the land. In *The Bank of Nova Scotia Berhad v Saunah binti Kasni* [2015] MLJU 917; [2016] 1 CLJ 505, the court held that the charge created out of a defeasible transfer must necessarily be avoided. In *Rajamani a/p Meyappa Chettiar v Eng Beng Development Sdn Bhd & Ors* [2016] 3 MLJ 660; [2016] 4 CLJ 510, the Court of Appeal drew a distinction between indefeasibility and validity of title. The Court of Appeal held that the fact that the defendant purchased the said land in good faith and for value did not confer indefeasibility if the title to such land was void at inception, that is, that the second document of title was a void document of title, it being issued during the subsistence of the valid document of title. Following the reasoning in *Rajamani*, the document of title (version 3) in the instant case was void, as it was issued during the subsistence of the real document of title (version 2) in the possession of the appellant. Pursuant to s 294(2) read together with s 306(a) of the NLC, the presentation of the discharge of charge must be accompanied by the document of title and duplicate charge. In the instant case, both signature and attestation of the discharge of charge as well as the document of title (version 6) with the *pelan tanah* were forgeries. The discharge of charge was an invalid instrument to determine the appellant's interest in the

said land in accordance with s 206 of the NLC. Registration of the charge in favour of the first respondent, which was based on forged and invalid documents, was defeasible under s 340(2)(b) of the NLC. Forgery under s 340(2)(b) of the NLC is a distinct ground of defeasibility, where knowledge is wholly irrelevant. Forgery per se suffices to render a registered title defeasible, irrespective of the knowledge of the first respondent. Forgery as a distinct ground of defeasibility is clear from the express wording of s 340(2)(b) of the NLC. That position in law was endorsed in *Tenure and Land Dealings in the Malay States* (Singapore University Press 1975) at pp 361–363 by David SY Wong, and adopted by the Court of Appeal in *OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim* [1999] 2 MLJ 511; [1999] 2 CLJ 949. The first respondent's charge was similar to *OCBC* as analysed by *Tan Ying Hong*. In *Tan Ying Hong*, the Federal Court held that the immediate holder of the registered charge procured by a forged power of attorney could not take advantage of the proviso. The Federal Court overruled [2001] 1 MLJ 214, where it was held that the proviso was available to an immediate purchaser in good faith and for valuable consideration. In *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768, the Federal Court held that immediate purchasers were not entitled to the proviso. Wong, who procured title by the forged discharge of charge and forged document of title (version 6) with the forged *pelan tanah*, could not be an immediate purchaser. Wong acquired no title whatsoever to create the charge in favour of the first respondent. Following the reasoning in *Kamarulzaman*, the first respondent was an immediate purchaser, and the title, which was procured by forged instruments, was defeasible. The first respondent was not a bona fide purchaser, as registration of the charge was obtained by forged documents, and as the first respondent failed to properly investigate all matters that pertained to the sale and creation of the charge (counsel cited *Gibbs v Messor & Co* [1891] AC 248 and *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136). A proper search would have disclosed: (i) that the purchase by Wong was completed on 25 November 2009, when the said land was then the subject of foreclosure proceedings by the appellant; and (ii) that there was an obvious irregularity on the face of the discharge of charge which wrongly stated that CIMB was formerly known as Southern Bank Bhd. There was no CTOS or CCRIS search conducted on the Chings. The loan was disbursed before the transfer to Wong and the charge to first respondent were confirmed. The entire appellant was set in motion by the grant of the loan to Wong. The appellant had no relationship with Wong who was the first respondent's customer. Yet the first respondent failed to procure Wong to testify, to prove that the first respondent was a subsequent purchaser. The Court of Appeal was mistaken that the only issue was whether the first respondent was an immediate or subsequent purchaser. The Court of Appeal failed to consider that the document of title (version 6) with the *pelan tanah* was a forgery, and that a charge cannot subsist on its own. The charge, which was obtained by forgery, should be set aside.

[54] The first respondent submitted as follows. 'Interest' in land includes a charge (counsel cited *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267b, *Tan Ying Hong* at para [26], *Daito Kogyo (Sarawak) Sdn Bhd v Port Dickson Land Development Sdn Bhd* [2001] 2 MLJ 531, and ss 205, 214, 221, 241, 282, 340(1) of the NLC). The term 'purchaser' extends to all with an interest in the land. That is supported by s 5 of the NLC which defines 'purchaser' as 'a person or body who in good faith and for valuable consideration acquires title to, or any interest in land'. In *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 6 MLJ 475, the Federal Court applied *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, where it held that interest under the NLC are leases, charges and easements. In *Tan Ying Hong*, the Federal Court analysed the decision in *OCBC* where it was held by the Court of Appeal that the that the title of the chargee bank was not indefeasible, and held at para [26] that the reasoning in OCBC was flawed. In *Tan Ying Hong*, the Federal Court expressly referred to the chargee bank as a subsequent purchaser protected by the proviso, and explicitly accepted that a chargee was a purchaser. In *Teh Cheng Choo v Malayan Banking Bhd* [2009] 5 CLJ 463, the land was fraudulently transferred to one Lim Ong Ah who fraudulently charged the land. At para [27], the Court of Appeal held that Malayan Banking was a bona fide purchaser and thus was protected by the proviso. In *Heveaplast Marketing Sdn Bhd v See Leong Chye @ Sze Leong Chye & 3 Others and other appeals* [2016] MLJU 835; [2017] 2 CLJ 43, the Court of Appeal likewise decided that a chargee bank is a purchaser within the meaning of the proviso. In *Kasai Reiko v Annie Lor Lee Fong & Ors (Public Bank Bhd, intervener)* [2014] 7 MLJ 652, Lee Swee Seng J came to the same conclusion that a chargee bank who derived interest from a fraudster fell within the definition of 'purchaser'. In *National Land Code — A Commentary* (2nd Ed) at p 826, Judith Sihombing stated that the term purchaser 'extends to all taking an interest in the land, for example a lessee or charge'. In *Indefeasibility of Title in Malaysia — The Revivification of Deferred Indefeasibility under the Torrens Systems — Focus on Fraudulently Obtained and Forged Titles* at p 139, Grace Xavier said that 'the persons in whose name the title had been registered, then transfers the title to another … or creates a charge on the property, then the subsequent person will obtain indefeasibility, or indefeasibility of the charge …'. Under the principle of deferred indefeasibility, so long as the financial institution is bona fide, its interest is protected by the proviso. It would have far reaching consequences if financial institutions were excluded as purchasers. In *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, the former Supreme Court qualified the *nemo dat* principle and said that a bona fide purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. The appellant had strayed from the leave question. At no time was it argued in the courts below that a charge would not come within the meaning of 'purchaser'. The sole question in the court below was whether the respondent was an immediate or subsequent purchaser. Both courts below held that a chargee is a purchaser. There was no finding that the

first respondent was not a bona fide chargee/purchaser. The trial court held that the first respondent and solicitors acted properly, and that the appellant and first respondent were defrauded by a third party. The Court of Appeal did not find that there was any lack of bona fides on the part of the first respondent. On the issue of whether the first respondent was an immediate or subsequent purchaser, the Court of Appeal said that that was a matter of fact. The analysis of *OCBC* in *Tan Ying Hong* made the former case squarely within the instant case. The decision in *Tan Ying Hong*, to wit, that a chargee bank has an interest and is entitled to protection under the proviso, was wholly applicable to the instant case.

[55] In its reply submission, the appellant responded as follows. A charge is not an interest acquired by a purchaser within the meaning of the proviso. A charge is dependent on the validity of the title of the charger. In *M & J Frozen Food*, the former Supreme Court referred to *Taylor v Land Mortgage Bank of Victoria Ltd* (1886) 12 VLR 748, where it was said that in the Torrens system, 'the estate and interest in the land remains with the proprietor until he has done all that is necessary to divest the estate out of himself and vest it in the transferee'. The former Supreme Court said that the aforesaid principle was embodied in s 267(1)(a) of the NLC, and that s 267(1)(a) of the NLC 'clearly negates any judicial proposition that the charger abdicates his proprietary rights at the stage of the auction sale'. In *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266, the Federal Court held that 'the mortgagor retains ownership whilst the mortgagee acquires a statutory right to enforce his security' (on the rights of a chargor and chargee, counsel also referred to *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317, *Development & Commercial Bank Bhd, Johore Bahru v Kim Ming Choon* [1991] 2 MLJ 246; [1991] 1 CLJ 732, *Kuala Lumpur Finance Bhd v Yap Poh Khian (Teo Sik Eng & Anor, interveners)* [1992] 1 MLJ 472, *Public Bank Bhd v Phan Seng Kee & Ors* [1991] 3 CLJ 2560, *Malayan United Finance Bhd v Tay Lay Soon* [1991] 1 MLJ 504). In *M & J Frozen Food*, the former Supreme Court referred to and followed *Gibbs v Messor & Co*, where the vendor's title was good but the instrument used by the purchaser for registration was void and or voidable, and where the Privy Council held that the effect of registration of such instrument only conferred deferred indefeasibility. The principles enunciated in *M & J Frozen Food* established that a charge is a species of security transaction where the chargor remains the registered proprietor until registration of a valid transfer in the name of a purchaser under a judicial sale. Wong acquired a defeasible title. Once it was established that Wong acquired no title, then Wong could not create a charge out of his title. Following the principles in *M & J Frozen Food*, Wong had not abrogated his rights to the said land. In *OCBC*, the Court of Appeal held that the registered title or interest of an acquirer obtained by forgery was defeasible. A forged instrument is a nullity which does not confer any right or title to the transferee. Such transferee has no right to charge or create any interest in land which is not his. A chargee who

claims title through an immediate acquirer who obtained his title by forgery is not protected by the proviso. Following *OCBC*, a chargee cannot be a 'purchaser' within the meaning of the proviso, as the chargee takes his interest through the immediate acquirer whose title is tainted by forgery. Implicit in *OCBC* is that a charge is a species of derivative interest that is subject to the infirmities of the title of the proprietor. The contention that the first respondent was a subsequent purchaser in good faith and for valuable consideration was unmaintainable, as Wong who procured title by forged documents had not acquired any interest whatsoever. The first respondent was not a subsequent purchaser, and whose charge was defeasible. To hold that the first respondent as a subsequent purchaser would return to *Adorna Properties*, where it was held that the purchaser obtained a good title, albeit that the title was procured by a forged transfer. In *Tan Ying Hong*, the Federal Court ruled that the charge was liable to be set aside, as the charge as created by the use of a forged power of attorney, and held that the immediate holder of the charge procured by the forged power of attorney could not take advantage of the proviso. The statement of law in *Tan Ying Hong* with respect to *OCBC* was flawed, as it was an opinion in respect of a hypothetical question and is no authority that *OCBC* could be decided differently if the same facts were to arise. In *Tan Ying Hong*, the Federal Court answered that an acquirer of a registered charge by means of a forged instrument does not acquire an immediate indefeasible interest or title. *OCBC* was consistent with the ratio decidendi in *M & J Frozen Food* which was referred to with approval in *Tan Ying Hong*. In *The Bank of Nova Scotia Berhad v Saunah binti Kasni*, it was held that the charge created by the chargor who obtained title by forgery was defeasible, and that a charge is not an interest in land. *Teh Cheng Choo v Malayan Banking Bhd* was decided before *Tan Ying Hong*. The decision in *Heveaplast Marketing Sdn Bhd v See Leong Chye @ Sze Leong Chye & 3 Others and other appeals*, where the title of the chargor was defeasible and it was held that the chargee was a subsequent purchaser, was wrong in law. The decision in *Kasai Reiko v Annie Lor Lee Fong & Ors (Public Bank Bhd, intervener)*, where the charge was created after the chargor was registered as proprietor and it was held that the chargee was a purchaser in good faith, is untenable in law. The first respondent had the burden to prove that it was a purchaser in good faith and for valuable consideration, and that the transfer to Wong was valid.

[56] In its reply submission, the first respondent submitted as follows. All proposed leave questions to do with forgery were rejected by the leave panel. All findings of the Court of Appeal remained intact. The leave question only required an affirmative or negative answer. The appellant could not ventilate issues on forgery (counsel cited *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener)* [2015] 4 MLJ 166, where the appellant was confined to the two leave questions which incorporated a point of law and not permitted to seek a reversal of the findings of fact of the courts below). The appellant could not go beyond the leave

question. A chargee is a purchaser (learned counsel again cited ss 5, 205, 241, 340(1) of the NLC, *Score Options Sdn Bhd v Mexaland Development Sdn Bhd*, *Tan Ying Hong* at para [26], *T Damodaran v Choe Kuan Him* at p 269, *Teh Cheng Choo v Malayan Banking Bhd*, *Heveaplast Marketing Sdn Bhd v See Leong Chye @ Sze Leong Chye & 3 Others and other appeals*). A bona fide purchaser for value who acquires title from the immediate purchaser obtains an indefeasible title (learned counsel cited *Kamarulzaman* at paras [16] and [46]). A registered proprietor, even though he does not possess an indefeasible title, may give an indefeasible title to a bona fide purchaser (learned counsel cited *Tan Ying Hong* at para [46] which cited *Sale and Purchase of Real Property in Malaysia* by Visu Sinnadurai). The argument that a charge is dependent on the validity of the chargor's title is contrary to s 340(2) and (3) of the NLC. It was settled by *Tan Ying Hong* and *Kamarulzaman* that a defeasible title can be the root of good title to a bona fide purchaser. *M & J Frozen Food* recognised that the *nemo dat* principle had been modified. The facts in *M & J Frozen Food* were different. In *M & J Frozen Food*, it was a one stage transaction, and the proviso did not come into play. In the present case, it was a two stage transaction, first the transfer and then the charge. The appellant relied on *OCBC*, a decision that was held as flawed. It was incorrect to suggest that the first respondent advocated a return to *Adorna Properties*. 'We are simply applying the deferred indefeasibility principles under the proviso to the facts of the present case, to the first respondent who was a subsequent purchaser in a two stage transaction. *Adorna Properties* was wrongly decided because it applied the proviso to s 340(2) ... That was set right in *Tan Ying Hong* ... where the Federal Court held that the proviso was only applicable to s 340(3), ie to subsequent purchaser and not to the immediate purchaser'. In line with that, the Federal Court was of the view that OCBC's charge was indefeasible, as *OCBC* was a subsequent purchaser. As in *OCBC*, the first respondent's charge came about from a two stage transaction. Section 340(3) of the NLC did not require the first respondent to prove that Wong was an immediate bona fide purchaser. The trial court found that the first respondent had made all inquiry and searches. The first respondent had discharged the burden of proof.

[57] The second and third respondents, who filed a separate appeal (B01(NCVC(W)-327–08 of 2014) against the decision of the trial court, but which separate appeal was struck out by reason of the success of the first respondent at the Court of Appeal, took the stand that it was mutually agreed they would file a fresh appeal at the Court of Appeal against the decision of the trial court in the event that the decision here should be against the first respondent. But other than that, the second and third respondents agreed to abide by any order of this court with respect to the competing charges.

[58] It was submitted *Tan Ying Hong* at para [26] overruled *OCBC* which held that the chargee bank had not acquired an indefeasible title, and that

OCBC as analysed in *Tan Ying Hong* was on all fours with the facts of the instant case.

[59] In *OCBC*, the appellant was the chargee. The charge was created by one Ng See Chow who acquired title through a forged transfer. Ng See Chow failed to repay the loan. The appellant applied and obtained an order for sale of the land. Ng Kim Hwa claimed that the land belonged to him and that he had not executed any transfer of the land to Ng See Chow. A registrar's caveat was entered against the land to prevent sale by the appellant. Contending that its charge was indefeasible, the appellant applied to have the caveat removed. That application was refused. The appellant appealed. In dismissing the appeal, NH Chan JCA held as follows:

> Now, if we apply this to the facts of the present case, what we have is this. If the registered title of the land (which is in Ng See Chow's name) is defeasible under s 340(2)(b) because its registration was obtained by forgery, it (ie Ng See Chow's title) is liable to be set aside at the instance of the true owner Mr Ng Kim Hwa (*even though Ng See Chow was an innocent purchaser for value*) and any interest (for example, any charge or lease) granted by Ng See Chow is similarly liable to be set aside. This is because in s 340(2) there is no proviso (as there is in s 340(3)) to protect the innocent purchaser (who is the immediate acquirer) for value or to protect anyone claiming through or under the immediate acquirer (even though that person be an innocent purchaser for value). So that, the chargee which Ng See Chow has granted thereout to the appellant bank (OCBC Bank (M) Bhd) as chargee is not protected because there is no proviso in sub-s (2) to protect the chargee bank which is a person claiming through or under Ng See Chow. The charge, therefore, is also liable to be set aside by Mr Ng Kim Hwa. (Emphasis added.)

[60] NH Chan JCA held the proviso applies only to s 340(3) and not to s 340(2) of the NLC, and that the proviso does not protect an innocent immediate purchaser, or anyone claiming through or under the immediate purchaser — '... in s 340(2) there is no proviso (as there is in s 340(3)) to protect the innocent purchaser (who is the immediate acquirer) for valuable consideration or to protect anyone claiming through or under the immediate acquirer (even though that person be an innocent purchaser for value)'.

[61] In *Tan Ying Hong*, Arifin Zakaria CJ (Malaya) as he then was, thus remarked on the judgment of NH Chan JCA in *OCBC*:

> [26] NH Chan JCA in delivering the judgment of the Court of Appeal was of the opinion that the proviso to s 340(3) of the NLC applies exclusively to those situations which are covered by sub-s (3). The court then went on to hold that the charge granted by Ng See Chow to the appellant was liable to be set aside by the true owner since the title was obtained by forgery. On the facts of that case, we agree that the title of Ng See Chow is defeasible under s 340(2) of the NLC as he obtained his title through a forged instrument. However, we are of the opinion that the appellant

bank, being the holder of subsequent interest in the land is protected by the proviso to s 340(3) of the NLC. For that reason we are of the view that the finding of the Court of Appeal in that case is to that extent flawed.

[62] On account of *Tan Ying Hong* at para [26], it was submitted that the first respondent, who likewise was a chargee bank, was also a subsequent purchaser protected by the proviso.

[63] To the contrary, it was submitted that *Tan Ying Hong* at para [26] was inconsistent with itself at paras [8], [9] and [11]. For a better understanding of *Tan Ying Hong* at paras [8], [9] and [11], the judgment of Zaki Azmi CJ should be read from para [5]:

[5] Let us refer to the first owner of a piece of land as 'A' who then transfers the same piece of land to 'B' and which subsequently is transferred to 'C'.

[6] As far as s 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short if A's name appears on the registration, no one can come and claim for that title. The law will not entertain it at all.

[7] Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or anyone else to which he was a party or privy then his claim to the title or interest can be defeated (see s 340(2)(a) of the NLC). Otherwise, B stands in the same position as A.

[8] The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is the same (see s 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument.

[9] The third instance where B's title or interest could be defeated is where it was unlawfully acquired through the exercise of any power or authority conferred by any law. Section 340(2)(c) of the NLC deals with one who was for example acting in his capacity as an agent to a power of attorney. *Even if C is in the same position as B, sub-s (3) also does not give protection to C unless he can show that he had acquired the title or interest in good faith and for valuable consideration. Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration. This is what is called deferred indefeasibility of title.* If his title or interest is challenged on similar grounds, the burden of proving there was valuable consideration and good faith lies on him. (Emphasis added.)

[10] As far as I am concerned, that is the simplest way of looking at s 340 of the NLC. I totally agree with the learned Chief Judge of Malaya's view that the error committed by the Federal Court in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 was to read the proviso to sub-s (3) as being a proviso to sub-s (2) as well. The error is very obvious because the proviso expressly

refers to 'this sub-section' which must in the context of that subsection be read as proviso to sub-s (3) only.

[11] I am legally obligated to restate the law since the error committed in *Adorna Properties* is so obvious and blatant. It is quite a well known fact that some unscrupulous people have been taking advantage of this error by falsely transferring titles to themselves. I hope that with this decision, the land authorities will be extra cautious when registering transfers.

[64] At para [7], Zaki Azmi CJ held that the title or interest of B, who obtained the same 'by fraud or misrepresentation by him or anyone else to which he was a party or privy' could be defeated. At para [8], Zaki Azmi CJ held that the title or interest of B, who obtained the same 'by forgery or by means of an insufficient or void instrument' could similarly be defeated and that in the instance of forgery or an insufficient instrument 'there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument'.

[65] Together, at paras [7] and [8], Zaki Azmi CJ made a distinction between 'title or interest obtained by fraud or misrepresentation' and 'title or interest obtained by forgery or an insufficient instrument' and held that in the case of 'title or interest obtained by forgery or an insufficient instrument' 'there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument', which implied that in the case of 'title or interest obtained by fraud or misrepresentation' there is need to show that B was party or privy to the fraud or misrepresentation.

[66] At para [9], Zaki Azmi CJ held that B's title or interest could be defeated where it was unlawfully acquired through the exercise of any power or authority conferred by any law, that s 340(2)(c) of the NLC deals with the situation where one, for example, acted in his capacity as an agent to a power of attorney, and that the proviso 'does not give protection to C unless he can show that he had acquired the title or interest in good faith and for valuable consideration. *Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration*'. (Emphasis added.)

[67] At paras [10] and [11], Zaki Azmi CJ agreed with Arifin Zakaria CJ (Malaya), as he then was, that the proviso only applied to s 340(3) of the NLC, and that *Adorna Properties* was wrongly decided.

[68] It would not appear that *Tan Ying Hong* at para [26] was at odds with itself at paras [8], [9] or [11]. But what was fascinating in *Tan Ying Hong* at para [26] was the view that the chargee in *OCBC* acquired a subsequent interest. A subsequent interest does not spring out of a vacuum. A subsequent

interest is acquired from a preceding title or interest. In *OCBC*, the charge was acquired by the chargee from the chargor. By stating that the chargee in *OCBC* acquired a subsequent interest, *Tan Ying Hong* at para [26] accepted that the chargor in *OCBC* was the holder of the preceding title or interest, or was the immediate purchaser. It should be noted that there was no finding that the chargor in *OCBC* was party or privy to the forgery. Indeed, it was the finding of NH Chan JCA — 'even though Ng See Chow was an innocent purchaser for value' — that the chargor in *OCBC* was a bona fide purchaser. As the chargor in *OCBC* was 'an innocent purchaser for value', it followed that the chargee in *OCBC* was a subsequent purchaser. Given that the chargor in *OCBC* was 'an innocent purchaser for value', *Tan Ying Hong* at para [26] was absolutely warranted to the view that the charge in *OCBC* acquired a subsequent interest. *It should be emphasised that in OCBC, there was an immediate purchaser and a subsequent purchaser, both in good faith and for valuable consideration.* It was on account of those facts that *Tan Ying Hong* at para [26] said that the chargee in *OCBC* was a subsequent purchaser. In no way was it said in *Tan Ying Hong* at para [26] that a chargee per se is a subsequent purchaser. It would be fallacious to read *Tan Ying Hong* at para [26] to mean that a chargee per se is a subsequent purchaser. *If a chargee per se is a subsequent purchaser, then the result in Tan Ying Hong would have been for the chargee bank. But it was not. The result was in favour of Tan Ying Hong*, which should scotched all interpretation or belief that *Tan Ying Hong* at para [26] ruled that a chargee per se is a subsequent purchaser.

[69] Whether a chargee is a subsequent purchaser must be decided on a case to case basis. The instant facts were different from *OCBC*. For in the instant case, it was the finding of the trial court, which was wholly undisturbed by the Court of Appeal, and not challenged by the first respondent that: (i) 'as a fact that the discharge of charge purportedly signed by the (appellant) had been forged'; (ii) the purported document of title (version 6) was not issued by the registering authority; and (iii) 'that (Wong) created a charge of the said land by forging the signature of the attorney of the (appellant) and registering the same as a discharge of charge to enable the current charge over the said land in favour of the (first) respondent to be registered'.

[70] The finding of the trial court was that Wong forged the signature of the attorney of the appellant on the discharge of charge, and that the document of title (version 6) together with the *pelan tanah* presented for registration of the transfer to Wong and charge in favour of the first respondent was not issued by the issuing authority. There was no evidence that the transfer was a forgery. But the discharge of charge was a forgery authored by Wong. As author of the forgery, could Wong be a purchaser, let alone a purchaser in good faith and for valuable consideration? If Wong were not a purchaser in good faith and for valuable consideration, then could the first respondent be a subsequent purchaser? If the first respondent were not a subsequent purchaser, then would

not its charge be defeasible? Those were the decisive questions that laid at the heart and core of the dispute and its resolution.

[71] With respect, the issue was not 'whether a chargee comes within the meaning of s 340(3) of the NLC' as proposed by the leave question. As rightly said by the Court of Appeal and agreed to by the first respondent before us, the issue was whether the first respondent was an immediate or subsequent purchaser. For if the first respondent, though purchaser, were not a subsequent purchaser, then the first respondent only acquired a defeasible interest. But of course, if the answer to the leave question were that a chargee does not come within the meaning of 'purchaser' under the proviso, then this appeal should be decided against the first respondent.

[72] This is the appropriate juncture, perhaps even overdue in point of time, to refer to s 340 of the NLC, which provides:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent —
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for

the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

[73] The proviso provides 'that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser'. Apparently, the charge was acquired by the first respondent in good faith and for valuable consideration. There was no issue on that. However, it was contended that 'a charge is not an interest acquired by a purchaser within the meaning of the proviso'.

[74] 'Interest' is not explicitly defined in ss 5 or 340 of the NLC. But that is not to say that the meaning of 'interest' is not spelt out in the NLC. For what is 'interest' could be gathered from the NLC, that is, if the provisions were only read together. Section 205(1) of the NLC provides that 'the dealings capable of being effected under this Act with respect to alienated lands and interests therein shall be those specified in Parts Fourteen to Seventeen, and no others'. And when read together with Parts Fourteen–Seventeen of the NLC, s 205(1) of the NLC provides that the dealings capable of being effected under the NLC with respect to alienated lands and interest therein shall be transfers, leases and tenancies, charges and liens, and easements. A transfer, for want of a better word, transfers the alienated land. But a lease, tenancy, charge, lien or easement does not transfer the alienated land. A lease, tenancy, charge, lien or easement creates an interest in the alienated land which does not pass but remains with the registered proprietor. And that interest in the alienated land, be it lease, tenancy, charge, lien or easement, is the 'interest' stated in the proviso.

[75] Besides s 205(1) read together with Parts Fourteen–Seventeen of the NLC, the authorities cited by the first respondent also settled it that a charge is an interest in alienated land. In *T Damodaran v Choe Kuan Him*, it was held by the Privy Council per Lord Diplock, delivering the opinion of the Board, that 'interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements'. In *Tan Ying Hong* at para [26], it was held that the chargee in *OCBC* had a (subsequent) interest. In *Daito Kogyo (Sarawak) Sdn Bhd v Port Dickson Land Development Sdn Bhd*, it was held by Abdul Malik Ishak J, as he then was, that 'once a charge is registered it takes effect immediately as security in the form of a legal interest in the land'. In *Score Options Sdn Bhd v Mexaland Development Sdn Bhd*, the Federal Court per Arifin Zakaria CJ, delivering judgment of the court, cited *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* where it held by the Court of Appeal per Gopal Sri Ram JCA, as he then was (VC George JCA, Abu Mansor JCA, as he then was, in agreement) that 'registrable interests falling short of ownership … are leases, charges and easements'.

[76] Other authorities not cited by the first respondent also plainly said that a charge is an interest within the proviso. To cite just a few, in *Malaysia Building Society Bhd v KCSB Konsortium Sdn Bhd* [2017] 2 MLJ 557, it was held by the Federal Court per Arifin Zakaria CJ, delivering the judgment of the court, that 'under the NLC, a charge is an interest in land'. In *Dial Kaur a/p Tara Singh v Mann Foong Realty Sdn Bhd* [2000] 3 MLJ 153, it was held by the Court of Appeal per NH Chan JCA, delivering the judgment of the court, that 'a charge is a registered interest in land that is charged to the creditor (chargee) as security for a loan'. And in *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, it was held by the former Supreme Court per Seah SCJ that 'a charge which affects the company's beneficial interest in land is a charge under s 108(3)(e) of the Companies Act 1965' (s 108(3)(e) of the Companies Act 1965, since repealed by the Companies Act 2016, read 'a charge on land wherever situate or any interest therein').

[77] It is irrefragable that a charge is an interest and that a chargee is a purchaser, both within the meaning of the proviso. The first respondent was a purchaser of interest in the said land. But as said, the real issue was not whether the first respondent was a purchaser, but whether the first respondent was an immediate or a subsequent purchaser.

[78] It is now settled that an immediate purchaser acquires a defeasible interest. Only a subsequent purchaser in good faith and for valuable consideration acquires an indefeasible interest. There was a period however when an immediate purchaser acquired an immediate indefeasible interest. That was because of *Adorna Properties*, where it was held by the Federal Court that the proviso also applied to sub-s 340(2), with the result that a purchaser of a title or interest, which was defeasible by any one the vitiating elements specified in s 340(2), acquired an indefeasible title or interest. *Adorna Properties* ruled in favour of immediate indefeasibility. Then came *Tan Ying Hong*, where it was held by the Federal Court that 'the Federal Court in *Adorna Properties* misconstrued s 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s (3) equally applies to sub-s (2). By so doing, the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s 340 of the NLC'. In effect, *Tan Ying Hong* put our Torrens system back to deferred indefeasibility, to where it was before, where 'it was the orthodox understanding that Malaysia's National Land Code provides for deferred rather than immediate indefeasibility' (*A law which favours forgers: Land fraud in two Torrens jurisdictions* by Tang Hang Wu and Loh Khian Chung (2011) 19 APLJ 130) (for further reading on our Torrens system before *Adorna Properties*, see *Tan Ying Hong* at paras [18]–[26] and *Kamarulzaman* at paras [15]–[28]).

[79] What is the difference between deferred and immediate indefeasibility? In *Forgeries and Land Registration* (The Law Quarterly Review 1985 Vol 101 at 79) RJ Smith explained that forgeries are seen as raising the distinction between immediate indefeasibility and deferred indefeasibility:

> In Torrens systems, forgeries are seen as raising the distinction between immediate indefeasibility and deferred indefeasibility. Immediate indefeasibility protects the registered proprietor simply because he is so described on the register. In our example concerning dispute between A, C and D, both C and D appear on the register and therefore prevail over A who no longer is on the register. Deferred indefeasibility is more subtle. Its analysis is that only when a purchaser relies on a statement in the register does he deserve or receive statutory protection. Thus C's difficulty is that he relies on the transfer wrongly executed by B who forged A's signature. Nothing in the register misled C. As the purpose of the legislation is to cure defects in title rather than defects in conveyances, C's title will not prevail against A. D, however, is in a different position. As C's chargee, he has relied on C's registered title. Accordingly, his title will be defeasible. This is what is called deferred indefeasibility: statutory protection on the next disposition after the forged transfer. After a fierce dispute lasting many decades, the Privy Council ruled in favour of immediate indefeasibility in 1967: *Frazer v Walker*. The Torrens system would today protect the interest of C against A, although the result was reached after considerable uncertainty.

[80] But in Malaysia, it is deferred indefeasibility, where 'the registered proprietor does not acquire indefeasible title upon registration but is postponed to one transaction removed from the original transaction involving the use of a defective instrument' (*A law which favours forgers: Land fraud in two Torrens jurisdictions*). The Torrens system here would not protect C against A.

[81] In Tan Sook Yee's *Principles of Singapore Land Law* (3rd Ed) at p 285, the learned authors thus illustrated: (i) the difference between immediate and deferred indefeasibility; and (ii) the defeasibility of title or interest of an immediate purchaser in good faith and for valuable consideration, who would be C in *Forgeries and Land Registration* at p 79:

> In the early days of Torrens jurisprudence, there was some uncertainty as to whether a registered proprietor obtained an immediate indefeasible title or merely a deferred indefeasible title. An immediate indefeasible title means that the registered proprietor's title becomes indefeasible once his title is registered, notwithstanding that the source of the new registered proprietor's title might be the result of forgery. *A deferred indefeasible title, on the other hand, defers the shield of indefeasibility until the next purchaser*. An illustration of the difference between both theories is as follows: X is the original owner. *Y forges X's signature and sells the property to Z, who was not privy to the forgery. Z registers the transfer and becomes the new registered proprietor. If indefeasibility were conferred immediately, Z's rights over the land will prevail over X's, notwithstanding that Z's title was derived from forged documents. In contrast, under the theory of deferred indefeasibility, Z's rights will not prevail as against X. However, should Z then sell the land to A, A will be able to claim indefeasibility as*

against X. Indefeasibility of title is thus conferred to the next purchaser. (Emphasis added.)

[82] Deferred as opposed to immediate indefeasibility was also explained in *Tan Ying Hong* at para [20], by espousal of the following commentary in *The National Land Code, A Commentary* (Vol 2) by Judith Sihombing at para 404:

> [20] Indefeasibility can be immediate or deferred. The distinction between the two is well explained in para 404 of *The National Land Code, A Commentary* (Vol 2) by Judith Sihombing which reads:
>
> > There are two types of indefeasibility; immediate and deferred. The factor which distinguishes the two is the common law effect given to the instrument even after registration; in addition; in a regime of deferred indefeasibility, the role of registered volunteer might be more relevant than under an immediate indefeasibility system. If, after registration has occurred, the system then ignores the substance, form and probity of the instrument used to support the registration, the system is likely that of immediate indefeasibility. Thus, registration has cured any defect in the instrument being registered. *If the instrument, despite registration, still has the power to affect the registered interest or estate, the system will probably be that of deferred indefeasibility*. (Emphasis added.)
>
> [21] In short, immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence of any vitiating circumstances. *In the case of deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer*. Thus, the difference between immediate and deferred indefeasibility hinges on the effect of registration vis a vis the title or interest (Emphasis added.)

[83] That indefeasibility is not absolute and that only a subsequent purchaser in good faith and for valuable consideration acquires an indefeasible title or interest was explained in *Tenure and Land Dealings in the Malay States* by David Wong at p 374 as follows:

> *When a registered title or interest in land is rendered defeasible in any of the circumstances considered above, it is liable to be set aside not only in the hands of its immediate holder but also in the hands of any person to whom it may subsequently be transferred*: so is any lesser interest subsequently granted thereout. *But, such continuing defeasibility will end with respect to any title or interest when it comes to be acquired by 'any purchaser in good faith and for valuable consideration' in whose hands the title or interest will be cured of its past defeasibility*, which accordingly will also not affect any person 'claiming through or under such a purchaser'. All this is stated in section 340(3). Thus, so long as a defeasible title or interest remains on the register and has not been set aside, it is capable of subsequent dealings by its holder. And, indeed, it can be a root of good title in favour of any subsequent purchaser 'in good faith and for valuable consideration'. (Emphasis added.)

[84] *Tan Ying Hong* at para [52] was categorical that the proviso only applies to a subsequent dealing:

> [52] Furthermore, even though sub-s (3)(a) and (b) refer to the circumstances specified in sub-s (2) they are restricted to subsequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s (3) ought not to be extended as was done by the court in *Adorna Properties*, to apply to sub-s (2)(b). By so doing, the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.

[85] *Kamarulzaman* at para [15] was equally explicit that indefeasibility under the regime of deferred indefeasibility is not absolute, that a title or interest that is not indefeasible continues to be defeasible (s 340(2)(a) of the NLC), that any interest subsequently granted thereout is liable to be set aside in the hands of any person or body in whom it is for the time being vested (s 340(2)(b) of the NLC), and that a defeasible title or interest continues to be defeasible and will only become indefeasible when title is acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser (proviso):

> [15] ... Before *Adorna Properties*, the law on s 340 could be broadly summarised as follows. 'Upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land, that is a title or an interest which is free of all adverse claims or encumbrances not noted on the register. The effect of registration then is to defeat all prior unregistered claims. Indefeasibility is however not absolute ...' (*Land Law in Malaysia, Cases and Commentary* by Teo Keang Sood and Khaw Lake Tee, (2nd Ed) at p 134). Indefeasibility is subject to the exceptions in s 340(2). Under s 340(2), the title or interest shall not be indefeasible: (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. *A title or interest that is not indefeasible continues to be defeasible and is 'liable to be set aside in the hands of any person or body to whom it may subsequently be transferred' (s 340(2)(a)) and any interest subsequently granted thereout is liable to be set aside in the hands of any person or body in whom it is for the time being vested (s 340(2)(b)). A defeasible title or interest continues to be defeasible and will only become indefeasible when title is acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser (proviso to s 340(3))*. (Emphasis added.)

[86] No room was left in *Kamarulzaman* at paras [43]–[44] for doubt that the defeasible title or interest of an immediate purchaser is liable to be set aside, and that the defeasible title or interest of an immediate purchaser only becomes indefeasible when it is subsequently passed to a bona fide subsequent purchaser:

> [43] In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were bona fide purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from Tan Ying Hong that the bona fides of an immediate purchaser is not a shield to defeasibility. *The defeasible title of a bona fide immediate purchaser is still liable to be set aside. The defeasible title of a bona fide immediate purchaser only becomes indefeasible when it is subsequently passed to a bona fide subsequent purchaser.* That the fifth and sixth respondents were bona fide purchasers could not by that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were bona fide subsequent purchasers. *But for the fifth and sixth respondents to have been bona fide subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased.* They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents were set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated. (Emphasis added.)
>
> [44] Accordingly, in relation to leave question 1, which should read as 'What was the effect of the judgment in default, which set aside the (order of distribution of) the estate of the deceased, to the transfers (by the first to fourth respondents) to the fifth and sixth respondents?', we would answer that the defeasible title of the first to fourth respondents was set aside by the default judgment, and that on the instant facts, the defeasible title of the fifth and sixth respondents was swept aside along with that of the first to fourth respondents. In relation to leave question 3, which should read as 'Whether the transfers by (the first to fourth respondents) to the fifth and sixth respondents were protected by s 340 of the National Land Code?', we would answer that the fifth and sixth respondents were immediate purchasers and so were not protected by the proviso to s 340(3). We need not answer leave question 2, as our aforesaid answers are already more than sufficient to dispose of this appeal.

[87] To acquire an indefeasible interest, the first respondent must be a subsequent purchaser in good faith and for valuable consideration. Let it be assumed *arguendo*, that the first respondent was a subsequent purchaser. *But if the first respondent were a subsequent purchaser, then who was the immediate purchaser?* Was Wong that immediate purchaser? If Wong were not that

immediate purchaser, then the first respondent could not be a subsequent purchaser. Now whether Wong was a purchaser must be judged from s 5 of the NLC which provides 'purchaser means a person or body who in good faith and for valuable consideration acquires title to, or any interest in land'. Could Wong wear the hat of purchaser? Could a forger of pertinent instruments of dealing be a purchaser in good faith in the first place? '... the basic element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction. But the overriding consideration is 'the particular circumstances of each case' (see *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; *Ong Ban Chai & Ors v Seah Siang Mong* [1998] 3 MLJ 346)' (*State Tailor Sdn Bhd v Nallapan* [2005] 2 MLJ 589 per Richard Malanjum JCA, as he then was, delivering judgment of the court).

[88] To repeat, the undisturbed finding of the trial court was that Wong forged the signature of the attorney of the appellant on the discharge of charge that Wong presented together with a forged document of title and false *pelan tanah* to enable registration of the forged discharge of charge, transfer, and charge. In fact, the first respondent submitted that the leave question was 'not a fact sensitive question at all'. The first respondent accepted that Wong was the forger, albeit of the discharge of charge. There was no evidence that the transfer was forged. But both the transfer to Wong and charge to the first respondent could not and would not have been registered in the first place without the forged discharge of charge. Wong, who authored the forgery, knew that. And Wong, who authored and presented the forgery for registration that opened the way for registration of the transfer and charge, could not have acted in good faith. The transfer was not forged. But the transfer could not have been registered without the forged document of title (version 6). Even when viewed in isolation, the transfer was not in good faith. But the entire transaction should be viewed as a single transaction. Transactions which are practically contemporaneous should be considered a single transaction (see *Home Trust Co v Zivic* (2006) 277 DLR (4th) 349). Also, the conduct of Wong should be viewed in totality and as a whole. The transfer would not have been registered but for the forgery of the discharge of charge. Wong surely knew that the Chings had not redeemed the said land from the appellant to effect a transfer of the said land, free of the charge, to him. That however was no obstacle to Wong, who forged the discharge of charge to engineer a transfer free of the charge. There could be no question about it. Wong defrauded the appellant of its charge. When viewed in totality, the overall conduct of Wong was criminal. It would rub salt to the wound if it were held that Wong was a purchaser in good faith. The cruelest cut of all would be that Wong, the forger, would have the right to redeem the said land if it were held that the charge was indefeasible.

[89] Wong was not a purchaser. Even if Wong could be a purchaser, he was

not a purchaser in good faith. Since Wong was not a purchaser in good faith, Wong could not be the immediate purchaser in good faith and for valuable consideration.

[90] I would answer the leave question as follows: a chargee is a purchaser within the meaning of the proviso. But the interest of a charge is defeasible, if the chargee were not a subsequent purchaser in good faith and for valuable consideration. Whether a purchaser is an immediate or subsequent purchaser is not determined by a tally of the number of transactions. Transactions could be contrived by fraudsters and accomplices (see *Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems* by Pamela O'Connor, Edin LR Vol 13 pp 194–223). A purchaser is a subsequent purchaser only if his title or interest were derived from an immediate purchaser (his vendor) in good faith and for valuable consideration. For the title or interest of the subsequent purchaser to be indefeasible, both immediate and subsequent purchasers must be purchasers in good faith and for valuable consideration (see *Wright v Lawrence* (2007) 278 DLR (4th) 698 at para [39] per Gillese JA, delivering the judgment of the court).

[91] In the instant case, as there was no immediate purchaser in good faith and for valuable consideration, the first respondent was Z in the final illustration of Tan Sook Yee. The interest of the first respondent was immediate and defeasible.

[92] I would allow the appeal with costs and restore the orders of the trial court against the first respondent. As for the orders of the trial court against the second and third respondents, they should be settled by the fresh appeal to be filed by the second and third appellants against the decision of the trial court, and further appeal, if any.

[93] Immediate indefeasibility gives certainty. But unless a security system is statutorily in place to prevent fraud and forgery, such as, but not limited to, the attendance of parties before the registering authority, as well as an indemnity scheme to compensate proprietors for the errors of the registering authority, deferred indefeasibility should remain, to protect innocent proprietors against fraud and forgery.

Appeal dismissed with costs.

Reported by Kohila Nesan